81-2250

Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

IVA MAY HARVEY, a widow, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLOYD H. SHEBLEY
19412 So. Henrici Road
P.O. Box 346
Oregon City, Oregon 97045
(503) 631-7244

WALLACE L. DUNCAN
CAROL MACKINNON
DUNCAN, WEINBERG & MILLER, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. What body of law determines ownership of land which (a) when conveyed by federal patent in 1914 was in Arizona, (b) by 1930 was on the California bank of the Colorado River, the interstate boundary, but (c) remained under the jurisdiction of Arizona until 1966, when by an interstate boundary compact Arizona relinquished control and transferred jurisdiction over this parcel to California?

2. Assuming the court of appeals was correct in choosing Arizona law to determine ownership of this California land, did it misinterpret the law of Arizona?

3. Did the district judge err in refusing to give a jury instruction modeled after the then-controlling federal doctrine of accretion.

4. Under what circumstances may equitable defenses constitute a bar to the United States asserting title to lands which it claims are in the public domain and defendants claim were patented to their predecessors in interest?

LIST OF PARTIES

This petition is submitted on behalf of 162 individuals[1/] who have

---

1/ Their names are: Iva May Harvey; Donald C. Allred and Bonnie L. Allred; Barney Arntzen; Donna Arntzen; Gaylord H. Arntzen; Willis E. Baker and Georgia M. Baker; Oscar J. Beem; Kenneth C. Bouck and Dorothy B. Bouck; Donna J. Brookins; George H. Brookins; Ralph (Continued)

been ejected from approximately 27 acres

W. Brookins and Blanche V. Brookins; Robert R. Brookins and Barbara I. Brookins; Robert Dean Buckman; Wanda Lee Buckman; Clarence H. Buzbee and Helen L. Buzbee; Willard Dewey Calder; Charlie Campbell and Mary Campbell; James M. Carpenter and Helen M. Carpenter; W.J. Carpenter and Naomi R. Carpenter; Donald Carvalho and Mabel Carvalho; Myron F. Cox and Cecilia M. Cox; Evelyn H. Curry; James Henry Curry; Leo Denham and Janice Denham; William de Yong and Helen de Yong; Jack Diamond and Frances Diamond; Don Dinsmore; Paul J. Evans, Jr. and Ruth C. Evans; Ray Allen Farmer and Lucille D. Farmer; Charles W. Feemsteer and Edna C. Feemsteer; Wilmer E. Foster and La Rue Foster; Gerardine M. George; Emil Matthew Haag and Genevieve Haag; Joanne E. McLain; Alice F. Harvey; Davonne F. Harvey; Denzil P. Harvey; Donald G. Harvey and Alice J. Harvey; Harvey, Kindred E., the Estate of; Donald E. Hausmann and Florence H. Hausmann; Lloyd B. Henkel and Helen C. Henkel; Ruby M. Holcomb; Ellis Holcomb; Howell D. Holcomb and Pauline E. Holcomb; Harvey J. Howell and Beulah I. Howell; Stewart Hubbard and Bonnie Dee Hubbard; Lydia Hubbard; Thomas G.

(Continued)

of land. Petitioners are defendants to

Hubbard; Harry J. Jacobsen and Myrl Ann Jacobsen; Wallace M. Johnson and Julia A. Johnson; Eugene Kaintz and Sandy Kaintz; Leroy Kirkpatrick and Mary E. Kirkpatrick; Phillip E. Kirkpatrick and Josephine Kirkpatrick; Clarence L. Knight, Jr.; Lee Deane Products, Inc., a California corporation; Frank E. Lago and Ethel E. Lago; Donald C. Lurk and Lavern C. Lurk; Karl Richard Lust and Monte Jan Lust; Steve J. McCoy; Jerome P. McLaughlin and Joanne E. McLaughlin; Verle W. McLaughlin and Gwyneth McLaughlin; Penny Meredith; Isla Mills; Harry E. Moore and Wilma B. Moore; Lee Moore, Jr.; Billy J. Nall; Chester H. Nall and Laura V. Nall; Jennifer Nall; Ernest H. Nelson and Gladys A. Nelson; Doris Palmer; Charles P. Patriquin and Florence A. Patriquin; Cecile L. Patriquin; Robert Hall; Gerald E. Patterson and Judy D. Patterson; Anna L. Peters; Paul G. Peterson and Elisa E. Peterson; Anthony J. Polanis and Helen L. Polanis; Michael F. Rhoades; Mary Evelyn Rhodes; Peggy Rhodes; Virgil Rhodes; William Earl Rhodes; William P. Rhodes; Ami L. Richardson and Velma Richardson; Paul E. Richardson and Norma T. Richardson; J. Linn Rodgers; Ralph

(Continued)

this action brought by the United States of America.

R. Ross and Anna Mae Ross; Ronnie Ruhs and Ruth Ruhs; Paula Rose Schaller; Joseph L. Smith and Dorothy B. Smith; Emma N. Snelling; Donald F. Stafford and Frances S. Stafford; Virgil D. Stiller and Elizabeth A. Stiller; Parker E. Stoner; James S. Thomas and Hilma M. Thomas; James Trulove and Helen E. Trulove; Robert W. Trulove and Beverly J. Trulove; Joseph S. Ward; Robert S. Ward and Marie E. Ward; Dennis L. Warn; Buddy D. Wayman and Frances M. Wayman; Henry E. West and Carolyn K. West; Frank Whichter and Mary Whitcher; Resil C. Williams and Helen F. Williams; Gaylerd Wiltfang and Collette Wiltfang; Loretta Wiltfang; Robert R. Worley and Shirley Worley; Lester Wright and Jean L. Wright. Names joined by the conjunction "and" are persons sued as husband and wife.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	vi
TABLE OF AUTHORITIES.....	viii
REPORTED DECISIONS BELOW.....	1
JURISDICTION.....	1
STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	5
REASONS THAT A WRIT OF CERTIORARI SHOULD ISSUE.....	19
I. THIS COURT SHOULD RECTIFY THE APPLICATION OF IMPROPER LEGAL STANDARDS TO RESOLVE THE QUESTION OF TITLE TO THE PROPERTY.....	23
A. This Court's decision in Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), does not compel application	

of Arizona law in this controversy..... 26

B. The circuit court's interpretation of Arizona law is contrary to the decisions of the Arizona Supreme Court..... 34

C. The district court did not instruct the jury in accordance with full federal law..... 41

II. THE CONSIDERATIONS SUPPORTING AN EQUITABLE BAR TO AN EJECTMENT ACTION BY THE UNITED STATES, CONSTITUTE AN IMPORTANT QUESTION WHICH HAS NOT BEEN, AND SHOULD BE, ADDRESSED BY THIS COURT, PARTICULARLY WHERE THE PERTINENT LEGAL PRINCIPLES EVOLVING IN THE CIRCUIT COURTS ARE CONTRARY TO CONGRESSIONAL POLICY AND SOUND PRINCIPLES OF EQUITY, AND WHERE THE UNGUIDED DECISION OF THE COURT OF APPEALS RESULTS IN MANIFEST INJUSTICE TO INNOCENT PARTIES..... 46

CONCLUSION..... 64

TABLE OF AUTHORITIES

Page

Federal Cases

Arkansas v. Tennessee, 246 U.S. 158 (1918).....19, 28, 32, 40

Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966)..... 16, 60, 61

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), reh. denied, 434 U.S. 1090 (1978)..... passim

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)..... 62

Michigan Wisconsin Pipeline v. Williams-McWilliams, 551 F.2d 945 (5th Cir. 1977)..... 48

Nebraska v. Iowa, 406 U.S. 117 (1972).....19, 28, 29, 40

Oki v. INS, 598 F.2d 1160 (9th Cir. 1979)..... 48

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co. 429 U.S. 363 (1977)..... passim

Schroeder v. City of New York, 371 U.S. 208 (1962)..... 62

Schweiker v. Hansen, 450 U.S. 785, (per curiam), reh. denied, ___ U.S. ___ , 101 S. Ct. 3023 (1981).....46, 47, 50

Semaan v. Mumford, 118 U.S. App. D.C. 282, 335 F.2d 704 (1964)..... 50

United States v. Aranson, No. 77-2295, slip op., (9th Cir. March 30, 1981, withdrawn April 17, 1981).....30, 34, 39

United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908)..... 53, 54

United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921)..... 56

United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966)..... 50

United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970)..... 57

United States v. Harvey, 661 F.2d 767 (9th Cir. 1981)..... passim

United States v. Harvey, No. 77-2279, (9th Cir. March 10, 1982) (order denying rehearing)..... 1

United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973)..... 48, 57

United States v. Lucienne D'Hotelle de Benitez Rexach, 558 F.2d 37 (1st Cir. 1977)..... 48

United States v. Moser, 341 U.S. 41 (1951)..... 49, 63

United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979)..... 47, 48

United States v. Southern Pacific Transportation Co., 601 F.2d 1059 (9th Cir. 1979)..... 32, 33

United States v. Wharton, 514 F.2d 406 (9th Cir. 1975)..... 57, 58

United States v. Winona & St. Peter Railroad Co., 165 U.S. 463 (1897).....49, 52, 53

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).... passim

State Cases

City of Long Beach v. Mansell, 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970)..... 24

City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929)..... 24

People ex rel. Dept. of Public Works v. Shasta Pipe & Supply Co., 264 Cal. App.2d 520, 70 Cal. Rptr. 618 (1968)..... 39

State v. Bonelli Cattle Co. 107 Ariz. 465, 489 P.2d 699 (1971), aff'd on reharing, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, 414 U.S. 313 (1973)..... .35, 36, 37, 38

State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P.2d 352 (1967)..... 35

State v. Jacob, 93 Ariz. 336, 380 P.2d 998 (1963)..... 35

State v. Superior Court (Fogerty), 29 Cal. 3d 240, 172 Cal. Rptr. 713, 625 P.2d 256, cert. denied, 50 U.S.L.W. 3248, reh. denied, 50 U.S.L.W. 3448 (1981)..... 24

Federal Laws

U.S. CONST. art. IV, § 3, cl. 2..... 55

28 U.S.C. § 1254(1) (1976)..... 1

28 U.S.C. § 1345 (1976)..... 18

28 U.S.C. § 2409a (1972)..... 2, 56

43 U.S.C. § 772 (1976)..... 54, 62

43 U.S.C. § 1068 (1976)..... 54, 56

43 U.S.C. § 1166 (1976)..... 51

Interstate Compact Defining the Boundary Between the States of Arizona and California, Pub. L. No. 89-531, art. I, 80 Stat. 340 (1966)..... passim

Act of Oct. 23, 1970, Pub. L. No. 91-505, 84 Stat. 1106..... 55

State Laws

ARIZ. REV. STAT. ANN. §§ 41-522 (West 1974)..... 4

1963 Ariz. Sess. Laws, ch. 77, § 2..... 3
§ 5..... 4, 30

1963 Cal. Stat., ch. 859
§ 1..... 3
§ 4..... 4, 30

CAL. CIV. CODE § 1014
(Deering 1971)..... 4, 34

CAL. GOV'T CODE (Deering 1973)
§ 175..... 4
§ 176..... 3

Other Authority

RESTATEMENT (SECOND) CONFLICT
OF LAWS § 6 (1971)..... 34

REPORTED DECISIONS BELOW

The opinion of the court of appeals is reported at 661 F.2d 767. The decisions of the district court are unreported.

JURISDICTION

The decision of the court of appeals was rendered on November 16, 1981. Petitioners timely sought rehearing; relief was denied by order entered March 10, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

The case involves the following federal and state statutes:

(1) Real property quiet title actions

> (a) The United States may be named as a party defendant in a civil action under

> this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

28 U.S.C. § 2409a, Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (1972).

(2) PURPOSE

> The boundary between the States of Arizona and California on the Colorado River has become indefinite and uncertain because of meanderings in the main channel of the Colorado River with the result that a state of confusion exists as to the true and correct location of the boundary, and the enforcement and administration of the

> laws of the two states and of the United States have been rendered difficult.
>
> The purpose of this compact is to fix . . . the boundary line between Arizona and California on the Colorado River. . . .

Interstate Compact Defining the Boundary Between the States of Arizona and California, Pub. L. No. 89-531, art. I, 80 Stat. 340 (1966); 1963 Ariz. Sess. Laws, ch. 77 § 2; 1963 Cal. Stat. ch. 859 § 1 (codified at CAL. GOV'T CODE § 176 (Deering 1973).

(3) Preservation of Rights.

> Nothing contained in the provisions of this act, or any operation thereof, shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved, whether such titles, rights or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were

> previously a part of the State of Arizona and have now become a part of the State of California, or were previously a party of the State of California and have now become a party of the state of Arizona, or otherwise; and no person shall be prejudiced in the water rights which he now has by reason of anything contained in this act.

Ariz. Sess. Laws ch. 77 § 5 (set out as note to ARIZ. REV. STAT. ANN. § 41-522 (West 1974)); 1963 Cal. Stat., ch. 859 § 4 (set out as note to CAL. GOV'T CODE §§ 175 (Deering 1973)).

(4) Alluvion

> Where, from natural causes, land forms by imperceptible degrees on the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

CAL. CIV. CODE § 1014 (Deering 1971).

STATEMENT OF THE CASE

This litigation involves 27 acres of land subdivided into 96 lots known as "Harvey's Fishing Hole". The acreage is located in the Cibola Valley, on the California bank of the Colorado River, approximately 17 miles below Blythe, California.

This property is part of a larger area surveyed by the United States in 1902 and described by reference to the Gila and Salt River Meridian. In 1960, the area was resurveyed; as then the River lay to the south and not to the north of the parcel, it has since been described by reference to the San Bernadino Meridian.

By federal patent dated January 13, 1914, President Woodrow Wilson conveyed

this and other lands to Mr. Cherry S.E. Carlin. The parties stipulated to the direct unbroken chain of title from Mr. Carlin to Kindred and Iva May Harvey. The Harveys purchased the disputed acreage on November 10, 1952 from Richard F. and Lillian M. Goulette, who had had title quieted in them by the Arizona state courts.

The Cibola Valley is a broad alluvial floodplain through which the Colorado River has meandered for centuries. Until closure of Hoover Dam in 1935, the River was wild and unpredictable. Devastating floods and rapid channel changes were not uncommon. Although in 1914 these 27 acres lay south of the Colorado River, by 1935 the River's course had changed so that the

land then lay north of the river. The movement was substantially completed by 1930. The 1930 channel was approximately 1,000 feet south of that of 1924.

Between 1909 and 1930, many attempts were made to contain the River. In 1909 Laguna Dam, a federal reclamation project near Yuma, Arizona, was closed, causing an aggradation of the riverbed in this area. Later, a 31-mile long levee was constructed nearby. The local irrigation district operated dredges, fresnos and similar equipment in and near the River to maintain this levee, particularly in connection with the severe floods of 1921, 1922 and 1924.

Also, prior to 1930, many efforts were made to alter the River's course.

Field tripods connected by cables were placed in it so that when the River rose trees and other water-born debris would be trapped, block the channel and, with luck, force the River into a new channel. During the same period, at least seven man-made cuts were constructed near Harvey's Fishing Hole in order to straighten the River's channel and eliminate several miles of its length. These cuts caused an extreme increase in the velocity of the River and a corresponding increase in erosion of its silty banks. As explained by government witness Mr. John McKwen, the cuts also caused a resurgent tendency for the River to meander and extend its bends in this area. No significant River

movements have occurred in the area since 1930.

When the Harvey's purchased this parcel in 1952, it was completely overgrown. During 1956 and 1957 the property was cleared for the development of a residential and recreational community. The parties stipulated that "the clearing and preparation of said lands for development was done openly and was observable by representatives of the United States, including representatives of the U.S. Bureau of Reclamation." App. at 87a.

At this same time, the Harveys obtained permission from the State of Arizona to subdivide this parcel. The State of California authorized them to advertise the lots in that state.

In 1958 the Harveys began selling lots, eighty of which had been sold by the time of the trial. Homes, boat docks, cabanas and other permanent improvements were built. Sales of lots and construction began with the knowledge of officials of the United States.

In the late 1950's, the Bureau of Reclamation, Office of River Control, began to review whether certain lands along the Colorado River were formed by accretion. At this time that office's hydrologist, Mr. McEwan, formed his opinion that Harvey's Fishing Hole was formed by accretion. He promptly informed the Solicitor's Office of his findings. Thereafter, he continued to visit Harvey's Fishing Hole, to talk with its occupants, and to observe them

build homes and make other permanent improvements. He did not tell petitioners to stop construction or inform them that, in his opinion, the land was formed by accretion and that they were trespassing.

In October 1960, the United States commenced a condemnation suit to take for a public purpose a parcel immediately downstream from Harvey's Fishing Hole. That suit involved 11.8 acres of land owned by R.A. and J.F. Beaver. The Harvey's, adjoining landowners, were named and served. Assured by the Beaver brothers they need not participate, the Harveys initially did not do so.

On May 8, 1961, Kindred Harvey and his son Donald attended a meeting held to explain the Interior Department's new

lower Colorado River land use permit program. The meeting was chaired by Mr. Graham Hollister, Special Assistant to the Secretary. He announced the government's goal of owning a 200-foot strip on either side of the Colorado River and stated that some private land might have to be acquired to accomplish this goal. At the conclusion of this meeting, the Harvey's inquired of Mr. Hollister if the United States intended to condemn the subdivision. Mr. Hollister, who advised the Harvey's he had not heard of the subdivision, answered "no."

Later in 1961, the Lower Colorado River Land Use Office began interviewing occupants with riverfront land pursuant to the new permit program. A government employee participating in this process,

Mrs. Ferne Blair, testified that when it came time to interview the occupants of Harvey's Fishing Hole, the office decided to defer speaking with them pending the outcome of the condemnation case against the Beavers.

Between 1961 and 1967, the government employed a Surveillance Specialist at the Land Use Office. He observed the development of Harvey's Fishing Hole and several times reported the occupants' progress and improvements to his superiors. In all other situations involving Colorado riverfront land, the Surveillance Specialist posted signs on any improvements built on land, and ordered the occupants to cease construction and occupancy until they received a use permit from the government. No signs

were posted at and no warnings were given to the occupants of Harvey's Fishing Hole.

In January 1963, the Harveys met with Melvin Crosby, Assistant Administrator of the Lower Colorado River Land Use Office, to discuss the occupany of another parcel of riverfront land. In his letter requesting this meeting, Mr. Crosby indicated that there was a "a question as to the status of the area you occupy in Sportsmen's Paradise [Harvey's Fishing Hole] area, and discussion of this area must be deferred to a later date." Ex. 92. At this meeting, Mr. Crosby was shown copies of the 1914 patent and of the Harvey's chain of title. After examining these documents he stated: "you could find no better

title in the United States. . . ." RT 792.

Later in 1963, the Harvey's became concerned that the Beavers were not disposed to fully defend the condemnation case. Accordingly, they filed an answer. The government moved to strike contending, inter alia, that the Harvey's "claims of interest in and to land adjoining the property and premises condemned herein are totally irrelevant and immaterial to the issues of the instant action." Ex. N at 8. In response to this motion and pursuant to a stipulation, the Harvey's agreed to withdraw their answer without prejudice. Based upon the government's representation that the result of that case was irrelevant, the Harvey's believed that

the Beavers' case would not affect their title to Harvey's Fishing Hole and they continued to sell lots.

The United States later was not required to compensate the Beavers because the district court concluded that the 11.8 acres were formed by accretion. The Ninth Circuit affirmed. Beaver v. United States, 350 F.2d 4 (1965), cert. denied, 383 U.S. 937 (1966) (hereinafter Beaver).

In 1966, the interstate compact redefining the boundary between Arizona and California was enacted to forever settle the confusion about which state had jurisdiction over land located in the floodplain of the Colorado River. Before then, some land located on the Arizona side of the river was claimed by

California and some land on the California side was claimed by Arizona.

Prior to 1966, Harvey's Fishing Hole was claimed by Arizona. The residents of Harvey's Fishing Hole paid real property taxes to Yuma County, Arizona. Yuma County reimbursed Imperial County, California, for the education of the children of the community. Yuma County appointed a Deputy Sheriff to keep the peace. Arizona regulated the subdivision's waterworks and the restaurant and lounge located there. Since ratification of the interstate compact, California has exercised jurisdiction over Harvey's Fishing Hole.

In January 1967, Mr. Crosby, on official business, met with Kindred Harvey at the subdivision. After a

personal inspection he stated "this parcel could not be accretion land." RT 649.

In April and May of 1967, the Lower Colorado River Land Use Office sent letters to each of the occupants of Harvey's Fishing Hole advising them that "we are now accepting applications for temporary use of land from occupants of Harvey's Fishing Hole subdivison (a.k.a. Sportmen's Paradise) who have been occupying land of the United States on or before August 24, 1965." Ex. AE. None of the occupants of Harvey's Fishing Hole made application. On July 17, 1972 the United States commenced this action pursuant to 28 U.S.C. § 1345 (1976) to eject petitioners from their lots and recover rent.

REASONS THAT A WRIT OF CERTIORARI SHOULD ISSUE

There are many important reasons for granting certiorari here.

First, the decision below misapplies the principles enunciated in Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (hereinafter Wilson), and disregards the rulings of Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (hereinafter Corvallis Sand), Nebraska v. Iowa, 406 U.S. 117 (1972), and Arkansas v. Tennessee, 246 U.S. 158 (1918). This long line of authority directs the application of California, not Arizona, law to resolve this dispute.

Second, the decision below contradicts two other relatively contemporaneous opinions of the same circuit

court which correctly apply the rulings of the aforementioned precedents. One of those decisions contradicts the selection of law made here and applies California law under similar circumstances. The other contradicts the substantive determination made here that the Arizona doctrine of accretion is different from that of California. The correct legal standard is one expressly mandated by the highest courts of both California and Arizona and previously acknowledged by this Court. Principles which determine questions of title to land must be consistent and definite, particularly where a boundary stream is involved.

Third, as this case involves construction of an interstate compact, this

Court's plenary review is especially warranted. Petitioners submit that the court of appeals' construction of this compact is contrary to its terms and is in discord with its purposes.

Fourth, this case raises several important questions of law which have not been, but should be, settled by this Court. These questions pertain to the assertion of equitable defenses against the United States in disputes over title to real property. Moreover, the equitable standards which were applied by the court below directly conflict with principles previously enunciated by this Court.

Fifth, the court of appeals' disregard of many applicable precedents is such a radical departure from the

accepted and usual course of judicial proceedings as to call for this Court's supervision. Also, the court of appeals' failure to exercise its equitable powers to correct the miscarriage of justice effected below (by inter alia, not voiding the award of back rent to the Government, see United States v. Harvey, 661 F.2d 767, 769, n.1 (9th Cir. 1981) (hereinafter Harvey)) is yet another reason that this Court should assume jurisdiction.

The foregoing considerations are discussed in two substantive sections. The first pertains to the choice of law issue. The second pertains to the petitioners' assertion of equitable defenses against the United States.

I. THIS COURT SHOULD RECTIFY THE APPLICATION OF IMPROPER LEGAL STANDARDS TO RESOLVE THE QUESTION OF TITLE TO THE PROPERTY.

At the time of trial, this Court had recently ruled that federal common law was to be applied in determining title to lands located along the Colorado River. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), reh. denied, 434 U.S. 1090 (1978) (hereinafter Bonelli). 2/ Significantly, it was held that under federal law "[t]he doctrine of accretion applies to changes in the river course due to artificial as well as natural causes." Id. at 327.

2/ Petitioners respectively submit that the short-lived doctrine promulgated by this Court in Bonelli is responsible for the length and complexity of this litigation.

As correctly noted by the Ninth Circuit, California law differs. "California Civil Code § 1014 recognizes a boundary shift only if it is precipitated by 'natural' as opposed to artificial accretion. The instruction advanced by the trial court made no reference to the cause of the accretion because it was modeled upon federal law." Harvey, 661 F.2d at 770. See State v. Superior Court (Fogerty), 29 Cal. 3d 240, 172 Cal. Rptr. 713, 625 P.2d 256, cert. denied, 50 U.S.L.W. 3248, reh. denied, 50 U.S.L.W. 3448 (1981); City of Long Beach v. Mansell, 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929).

Shortly after trial, Bonelli was overturned by this Court's decision in Corvallis Sand, supra. That case involved land located in the channel of the Willamette River, a navigable stream. Speaking for the majority Justice Rehnquist stated:

> Under our federal system, property ownership is not governed by general federal law, but rather by the laws of the several states. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' [Citation omitted.] This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of Swift v. Tyson, 16 Pet. 1 (1842), an exception was carved out for the local law of real property. [Citations omitted.]

> This principle applies to the banks and shores of waterways, and we have consistently so held. [Citations omitted.]

429 U.S. at 378-79.

On appeal, the Ninth Circuit agreed with petitioners that state law controlled. However, it determined that Arizona law and not California law was applicable. Further, it held that the district judge committed harmless error in instructing the jury under the federal standard because Arizona law is the same as federal law.

A. This Court's decision in Wilson, supra, does not compel application of Arizona law in this controversy.

The Ninth Circuit erroneously reasoned that "the principles established in Wilson are equally relevant here." Harvey, 661 F.2d at 771. It

then compounded the error by holding that the "preservation of rights" clause contained in Arizona and California statutes enacting the Interstate Boundary Compact, supra, requires application of Arizona law. Id. at 770-71.

Wilson simply does not apply. There, an exception to Corvallis Sand, supra, was created where the dispute is over land to which the United States "has never yielded title or terminated its interests. . . ." 442 U.S. at 670. In such cases federal law controls. Here, on the other hand, the government had parted with title to the land which it, as upland owner, now claims accreted to its land. Thus, Corvallis Sand, not Wilson, controls.

Application of California law here is in accord with a long line of Supreme Court precedent. E.g., Nebraska v. Iowa, supra; Arkansas v. Tennessee, supra. As explained by this Court in Arkansas v. Tennessee, and reiterated in Corvallis Sand and Nebraska v. Iowa:

> How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

246 U.S. at 175-176 (emphasis added). The Ninth Circuit was not free to select the law of a jurisdiction other than California.

Even assuming Wilson applies here, the Ninth Circuit should have fashioned its rule of decision after California law. In Wilson, it was held that federal law "borrows" state law to resolve questions of ownership. There, Nebraska law was followed because the boundary compact between Nebraska and Iowa contained a provision requiring that:

> Title, mortgage, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force in

> Iowa. Act of July 12, 1943, ch. 220, 57 Stat. 495.

442 U.S. at 678.

The "preservation of rights" clause enacted by California and Arizona is quite different. It simply provides, in pertinent part, that:

> Nothing contained in the provisions of this act . . . shall prejudice the titles, rights or claims of any person . . . to any lands herein involved . . . .

See 1963 Ariz. Sess. Laws, ch. 77, § 5; 1963 Cal. Stat., ch. 859, § 4. This provision only requires reference to Arizona law where use of California law would prejudice a litigant. Another recent Ninth Circuit decision, subsequently withdrawn for unrelated reasons, has so held. United States v. Aranson, No. 77-2295, slip op., (9th Cir. March

30, 1981, withdrawn April 17, 1981) (hereinafter Aranson) (App. at 121a). Any other construction would frustrate one of the express purposes of the Arizona-California Boundary Compact, which is to eliminate the confusion and difficulty in "the enforcement and administration of the laws of the two states and of the United States" caused by uncertainty over the location of the interstate boundary. Pub. L. No. 89-531, 80 Stat. 340 (1966).

The United States, as owner of land in California, cannot seriously contend it will be prejudiced by application of California law. Moreover, it could not have reasonably expected that title to accumulations to its California holdings

would be determined by Arizona law. See, e.g., Arkansas v. Tennessee, supra.

Another recent Ninth Circuit decision also is at odds with this case. United States v. Southern Pacific Transportation Co., 601 F.2d 1059 (1979), was a dispute over accretion to lands held by the government in trust for the Quechan Indians. Just as in this case, the upland was owned by the United States and was located in California; also the land found to have been eroded was in Arizona. Notwithstanding its reliance on Wilson, the court did not find, as it now does, that the "preservation of rights" clause compels application of Arizona law. Rather, the district court had correctly applied California law:

> Federal law borrows state law in determining title to avulsive or accretive lands affecting riparian land owned or possessed by the United States or by an Indian Tribe. (Wilson v. Omaha Indian Tribe, [citation omitted]). Under California law, the accreted land belongs to the Government, as owner of the riparian uplands. (Cal. Civ. Code § 1014 . . .).

United States v. Southern Pacific Transportation Co., 601 F.2d at 1066.

California, as the situs of the upland since statehood and of Harvey's Fishing Hole since 1966, and as domicile of the petitioners for several years prior to the commencement of this litigation, has vital interests in the outcome of this controversy (e.g., the welfare of its potentially homeless citizens, its ability to assess and collect property taxes). Arizona has no

such interest. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971).

Further, neither the government nor the petitioners had any reasonable expectation that Arizona law would be applied. By signing the Interstate Compact, Arizona relinquished any interest it had in this parcel. See Aranson, App. at 200a. No one contests California's jurisdiction over this small community. The Ninth Circuit committed reversible error in failing to apply CAL. CIV. CODE § 1014 (Deering 1971).

B. The circuit court's interpretation of Arizona law is contrary to the decisions of the Arizona Supreme Court.

The Ninth Circuit found that the district court committed harmless error in applying federal law since it found

Arizona law to be identical. Harvey, 661 F.2d at 771.

Three cases were relied upon in support of the conclusion that accretion, by Arizona definition, is simply "a 'gradual and imperceptible' movement." Id. Only one of those cases, State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), aff'd on rehearing, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, 414 U.S. 313 (1973), deals with the cause of the accretion, the critical inquiry here. The other two cases (State v. Jacob, 93 Ariz. 336, 380 P.2d 998, 1000 (1963), and State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P.2d 352, 356-57 (1967)), pre-date Bonelli and, like most accretion cases,

do not involve any artificial or man-made changes to a river's channel.

In Bonelli the Arizona Supreme Court had held that the state owned the disputed parcel. It reasoned that:

> Where a river shifts to a new location as a result of unnatural forces, the state does not lose title to the bed of the stream in the old location. People ex rel. Dept. of Public Works v. Shasta Pipe & Supply Co., 264 Cal. App. 520, [sic] 70 Cal. Rptr. 618. . . .

Id., 107 Ariz. at 469, 489 P.2d at 703. The Ninth Circuit acknowledged this passage from the Arizona Supreme Court's decision but attempted to distinguish it by simply saying: "Bonelli did not involve an upland private claimant." 3/

3/ This, of course, is not correct. The upland owner in that case was Bonelli Cattle Co. and not the State of Arizona, which owned the

(Continued)

Harvey, 661 F.2d at 772, n. 7. But no distinction between public and private claimants was created by the Arizona Supreme Court. And such a limitation is illogical and inconsistent with the Arizona court's later decision in Bonelli. There it was held that the:

> artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to completion of the Hoover Dam in 1938 and the later rechannelization by dredging. The condition of the Colorado River at or immediately prior to its control by artificial works is the appropriate time for determining the rights of the parties. . . .

108 Ariz. at 260, 495 P.2d at 1314 (emphasis added).

---

bed of the stream. See Bonelli, supra.

It is unlikely that the Arizona Supreme Court intended to confine this doctrine to the State, or that it would permit the "constitutionally vested" rights of others to be defeated by subsequent artificial control and rechannelization of the same river.

Moreover, it is noteworthy that the Arizona court relied on a California case in deciding that title to river-front property is not affected by "unnatural forces." Bonelli, 107 Ariz. at 469, 489 P.2d at 703. In the California case it was held that where the channel of a navigable stream was altered by mining and dredging operations, the State retained title to the old riverbed and did not acquire ownership of the bed of the new channel.

People ex rel. Dept. of Public Works v. Shasta Pipe & Supply Co., 264 Cal. App. 2d 520, 535, 70 Cal. Rptr. 618 (1968).

Finally, this Court has recognized that under Arizona law, artificial accretion does not affect ownership. 4/ Discussing the state court decision in Bonelli, this Court stated:

> The Arizona Supreme Court held that because the rechanneling of the Colorado River was an 'engineering relocation of the waters of the river by artifi-

---

4/ The Ninth Circuit also recently reached a similar conclusion in another Colorado River accretion case. "Although Arizona case law relevant to this issue is scant, the leading case, State v. Bonelli Cattle Co., [citation omitted] cites the California law on artificial accretion with approval. Because our resolution of the relevant issue employs the same law, it is unlikely that application of Arizona law would alter our result." Aranson, App. at 151a.

> cial means,' it was, under state law, an avulsion and did not divest the State of title. . . .

414 U.S. at 328. Indeed, this interpretation of Arizona law must be adhered to for, under principles previously laid down by this Court, if Arizona and California law of accretion differ, then California law must be applied if the River moved by accretion, and Arizona law must be applied if the River moved by avulsion. Arkansas v. Tennessee, supra, and Nebraska v. Iowa, supra. Such vagaries cannot be tolerated where title to real estate is concerned and are particularly disturbing where interstate boundaries are involved.

Thus, even if Arizona law applies, this Court should remand this case for a

new trial. 5/

C. The district court did not instruct the jury in accordance with full federal law.

When this case was tried, this Court's decision in Bonelli controlled. Bonelli contained the following analysis of the federal doctrines of accretion and avulsion:

> [F]ederal law must be applied with a view toward the limited nature of the sovereign's rights in the riverbed, and an

---

5/ Petitioners should be allowed an opportunity to develop the impact of the man-made alterations to the River's course and to allow the jury to be instructed on the relevance of causation. In concluding that there is no need to further develop evidence of artificial accretion, the Ninth Circuit erroneously assumes petitioners contended below that the United States caused the accretions. 661 F.2d at 772, n.7. This is not so. See pp. 7 to 8, supra.

> analysis of the interests of the State and Bonelli, in light of the rationale for the federal common-law doctrines of accretion and avulsion, compels the conclusion that, as between the state, as owner of the riverbed, and Bonelli, as riparian owner, the surfacing of the subject land should be treated as accretion. . . .
>
> The rationale for the application of the doctrine of avulsion is not applicable to this dispute because of the limited interests of the State in the subject property. . . . The State's acquisition of the exposed land here could only be a windfall, since unnecessary to the State's purpose in holding title to the beds of the navigable streams within its borders. Accordingly, the narrowing of the river and vesting of title to the surfaced land in riparian owners does not detract from the State's legitimate interest in title to the riverbed, so as to require mitigation of the accretion principle by application of the doctrine of avulsion.

Id., 414 U.S. 328-29.

Bonelli also contains the following observations:

> Finally, recognition of the State's claim to the subject land would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation, a question which we find unnecessary to decide on our view of the case. . . .
>
> * * *
>
> But there is no claim here by the State that depriving Bonelli of the subject land is necessary to any navigational or related purpose. [Citations omitted.] Moreover, what is involved in this case is not just a diminution or elimination of riparian rights, but the State's attempt to completely divest all of Bonelli's title and interest in the subject land.

Id. at 331-32. Petitioners submitted a proposed jury instruction (Requested Jury Instruction No. 15) modeled after these portions of the Bonelli opinion

which require a balancing of the interests of the respective land claimants in applying the federal common law of accretion. The district court refused to give this instruction, a reversible error. The Ninth Circuit did not address this issue.

Defendants' Proposed Jury Instruction N: 15 stated:

> In deciding whether the Colorado River moved by the process of accretion or avulsion, you should consider the respective interests of the parties in the land and whether a finding of accretion will result in a windfall to the U.S. government or a taking of the land from the defendants without compensation. Unless you find the land is necessary for navigational or some related purpose, you should not divest defendants of their title to "Harvey's Fishing Hole" by applying the doctrine of accretion. That is, you should consider the fairness of the end

> result before you make a finding of accretion or avulsion.

Obviously, under Corvallis Sand, state law now applies and Bonelli's analysis of the federal doctrines of accretion and avulsion need not be the ratio decidendi of this case. But Bonelli was the law when this case was tried and the district court did not properly instruct the jury. And when asked for a new trial under state law because of Bonelli's reversal, the district court refused, stating that California law was no different than federal law! RT 1051.

Fundamental fairness demands that petitioners be allowed to try this case either under state law, or under the full federal doctrine of accretion, as

articulated by this Court in Bonelli. So far they have been allowed to do neither.

II. THE CONSIDERATIONS SUPPORTING AN EQUITABLE BAR TO AN EJECTMENT ACTION BY THE UNITED STATES, CONSTITUTE AN IMPORTANT QUESTION WHICH HAS NOT BEEN, AND SHOULD BE, ADDRESSED BY THIS COURT, PARTICULARLY WHERE THE PERTINENT LEGAL PRINCIPLES EVOLVING IN THE CIRCUIT COURTS ARE CONTRARY TO CONGRESSIONAL POLICY AND SOUND PRINCIPLES OF EQUITY, AND WHERE THE UNGUIDED DECISION OF THE COURT OF APPEALS RESULTS IN MANIFEST INJUSTICE TO INNOCENT PARTIES.

As recently noted, this Court has not clearly defined the circumstances under which the United States might be estopped by the conduct of its agents. Schweiker v. Hansen, 450 U.S. 785, (per curiam), reh. denied, ___ U.S. ___, 101 S. Ct. 3023 (1981). Indeed the question of when "[t]he Government may be equita-

bly estopped . . . has been the subject of considerable ferment." Id. at 785 (Marshall, Brennan JJ. dissenting). Plenary consideration is overdue and sorely needed to provide adequate guidance to the lower courts. Id. at 792.

That the Supreme Court "will know an estoppel when [it] see[s] one provides" scant guidance for evaluating if the government should be estopped. Id. Indeed, this Court's history of virtual abstention from this area appears to be contributing to the development of a rigid, talismanic approach to estoppel and that doctrine is "being stripped of its equitable underpinnings." United States v. Ruby, 588 F.2d 697 (9th Cir. 1978) (Ely, J. dissenting), cert.

denied, 442 U.S. 917 (1979). Over the past decade, appellate analysis of estoppel claims has transformed from the judicious approach of "the estoppel doctrine is applicable to the United States where justice and fair play require it", [6] to an incantation that five specific elements must be satisfied, [7] and now to a formula embracing the further criterion that "an additional balancing test" is necessary

---

6/ United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); United States v. Lucienne D'Hotelle de Benitez Rexach, 558 F.2d 37 (1st Cir. 1977) (estoppel granted where it would be unconscionable to allow the United States to reverse an earlier position); cf. Michigan Wisconsin Pipeline v. Williams-McWilliams, 551 F.2d 945 (5th Cir. 1977).

7/ E.g., Oki v. INS, 598 F.2d 1160, 1162 (9th Cir. 1979).

where "the United States [acting as] trustee of public lands" is concerned. Harvey, 661 F.2d at 773.

This transformation of an equitable doctrine to a hard and fast legal standard is contrary to decisions of this Court in cases such as United States v. Moser, 341 U.S. 41 (1951), and United States v. Winona & St. Peter Railroad Co., 165 U.S. 463, 475 (1897) ("[s]urely after such a lapse of time, and after so many transactions in and with respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts"). The broad equitable powers of courts should not be subverted by rigid adherence to frozen criteria which are

not required by either the Constitution or traditional notions of fairness.

In the case at bar, the court of appeals separately reviewed seriatim "several instances of alleged government misconduct," but completely disregarded the fact that an estoppel can be worked by a course of conduct persisting over a period of time. E.g., Semaan v. Mumford, 118 U.S. App. D.C. 282, 335 F.2d 704 (1964); United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966) (noted in Schweiker v. Hansen, supra, at n. 4).

Furthermore, no special, extra balancing test nor generally restrictive approach has ever been required by this Court in land title disputes between citizens and the United States. Indeed,

just the contrary is evidenced by this Court's decisions, and the imposition of such a requirement is contrary to congressional policy discernable in many federal statutes.

For example, 43 U.S.C. § 1166 (1976) imposes a 6-year statute of limitations to actions by the United States to challenge the validity of a land patent. In an early case construing this statute of limitations, this Court would not allow the United States to belatedly challenge a patent issued as a result of a mistake. Rather, it found that:

> Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and it would not be fitting for the government to insist upon the

> letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations. . . .

United States v. Winona, 165 U.S. at 475-476. 9/

9/ Among the equities favoring the private litigants, were that the railroad had given value for the land received, that no individual was wronged by allowing the certification to stand, and that no fraud or wrong was imputable to the railroad. The Court went on to state: "Many years have passed since the certification, and since the company, in reliance upon the

(Continued)

The Supreme Court further elaborated upon congressional policy evidenced by 43 U.S.C. § 1166 in United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908):

> The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of

---

> title it believed it had acquired, has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained . . . and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed." Id. at 475. The relevance of these equities to this case is manifest.

> the United States, had that effect.... If the Act were confined to valid patents it would be almost or quite without use.

Id. at 450 (citation omitted; emphasis added).

Congress has subsequently spoken several times in this area of allowing public lands to conclusively pass into private ownership. The Color of Title Act, 43 U.S.C. § 1068 (1976), authorizes administrative actions to acquire title to public land by adverse possession. 43 U.S.C. § 772 (1976) forbids any resurvey of public lands to jeopardize rights accrued pursuant to a previous survey. More recently, Congress enacted 28 U.S.C. § 2409a (1972), to allow quiet

title actions to be maintained against the United States. 10/

In this case, the court of appeals remarked that the "property clause", U.S. CONST. art. IV, § 3, cl. 2, is "directly implicated when equitable estoppel is sought to be applied against a federal claim to title in land" and determined that "when Congress has not authorized a disposition of federal lands, the application of a remedy such as equitable estoppel against the federal claim or defense tends to frus-

---

10/ Additionally, in 1970, Congress enacted a public law which allowed similarly situated landowners a short distance upriver from these petitioners the opportunity to prove the merits of their claims to have title to certain accretion lands quieted in them. See Pub. L. No. 91-505, 84 Stat. 1106 (1970).

trate the intent of a specific constitutional provision." Harvey, 661 F.2d at 773, n.8. This is in manifest disregard for congressional policy, particularly as evidenced by 43 U.S.C. § 1068(a) and 28 U.S.C. § 2409a (1972).

That public lands which have been held as private property do not require any especially restrictive protection also is supported by sound judicial precedent. In United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921), this Court held that the United States could be precluded by laches from challenging even a patent procured through fraud, if the evidence showed that the United States was or should have been put upon inquiry by the facts of which it had knowledge.

Similarly instructive is United States v. Wharton, 514 F.2d 406 (9th Cir. 1975). There, the court found the United States was estopped from retaining title to certain lands. In addition to finding the elements of estoppel outlined in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), were satisfied, the court noted it was equally clear that the "fundamental fairness" standard of United States v. Lazy FC Ranch, supra, was met. The court explained:

> Governmental conduct would work a serious injustice if this family were divested of the home in which they have invested so much of themselves.
>
> The interest of the public would not be unduly threatened or damaged by invoking estoppel against the government and granting the occupants an opportunity to

> obtain this small tract of desert land. The public will be damaged to no greater extent now than it would have been had the original entry been completed. To the contrary, the public interest will be served by the addition of the land to the tax rolls once the Whartons have gained title. And, perhaps more importantly, the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens.

United States v. Wharton, 514 F.2d at 412-413.

In this case, the court disregarded decisions such as these. Instead, it employed a piecemeal and myopic analysis which failed to weigh considerations such as laches on the part of the United States, notwithstanding the fact that the Government failed to make a claim to the land for over forty years after it was allegedly formed and for over twenty

years after the Harvey's began clearing it with the knowledge of government officials.

In its serial review of several of the many instances of government misconduct briefed by appellants, the court of appeals held that Mr. Crosby's statement that the Harvey's "title was good" was irrelevant to whether the government was asserting title to the subject land. Similarly, it concluded that whether or not the government planned to condemn Harvey's Fishing Hole was irrelevant to whether the United States planned to assert title. These conclusions can only be described as incredible.

The Harvey's are laypersons. They sought information from the officials charged with responsibility for admin-

istering these lands and were told the government had no plans to condemn them and that their title was good. Indeed, Mr. Crosby testified that action on the Surveillance Specialist's reports which noted improvements and changes in ownership at Harvey's Fishing Hole was intentionally held in abeyance pending resolution of the Beaver case. RT 616, 636. Also, Mrs. Blair testified that Harvey's Fishing Hole was intentionally skipped over in the land use application and permit procedures adopted by the Land Use Office and that notification of the United States' claim was intentionally postponed until after resolution of the Beaver case. RT 572-573. Obviously, the court's holding that appellants have not alleged facts establishing an active

or intentional concealment is plainly incorrect. 11/

Similarly, footnote 12 of the court's opinion demonstrates a misapprehension of law and fact. Record owners

---

11/ The court of appeals specifically found that the government's conduct with respect to the Beaver case does not support an estoppel because the dismissal was without prejudice and "consequently . . . 'did not cause [appellants] to take action or fail to take action that [appellants] could not correct at any time.' Schweiker v. Hansen", supra. Quite to the contrary, petitioners were severely prejudiced by the government's successful efforts opposing their participation in the Beaver case. Several key witnesses died in the interim and the Harvey's continued to sell lots believing that the issues of Beaver were irrelevant and immaterial to their concerns and did not affect them. Petitioners were further prejudiced by government counsel's references to the jury in this case about the Beaver holding that the adjoining lands were accretion lands (RT 86, 807-808).

of lands potentially affected by a government claim are entitled to more than constructive notice of the claim. Schroeder v. City of New York, 371 U.S. 208 (1962). Also, the 1960 resurvey merely changed the legal description applicable to these acres and could not jeopardize petitioners' title. See 43 U.S.C. § 772 (1976); cf. RT 206-208.

Application of a full panoply of equitable considerations in this case will be consistent with "the duty of all courts to observe the conditions defined by Congress [as to a matter within its exclusive domain]." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). It also will avoid an egregious contravention of notions of "elementary fairness", United States v.

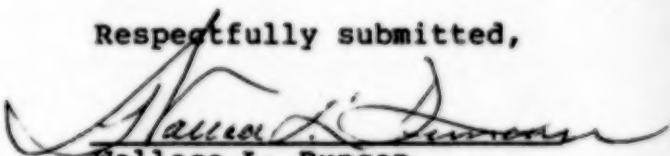
Moser, 341 U.S. at 47, which has been sanctioned by the appellate court.

In sum, for this Court to assume a supervisory role would be most appropriate here. The misguided analysis below has caused a miscarriage of justice. The decision of the court of appeals contravenes congressional policy with respect to claims against public lands and denigrates the appropriate equitable considerations to ensure that justice is achieved. It embraces a rigid test for applying estoppel, which test is a further retrenchment of an important and rapidly developing area which this Court has hitherto declined to affirmatively assist in shaping.

CONCLUSION

For all the reasons stated above, petitioners respectfully request that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



Wallace L. Duncan
Carol MacKinnon
DUNCAN, WEINBERG & MILLER, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

Floyd H. Shebley
19412 So. Henrici Road
P.O. Box 346
Oregon City, Oregon 97045
(503) 631-7244

June 7, 1982

CERTIFICATE OF SERVICE

I, Carol MacKinnon, an attorney for petitioners and a member of the Bar of this Court, certify that on this 7th day of June, 1982, the foregoing Petition for Certiorari and Appendix thereto, consisting of two volumes, was served upon respondents by mailing three copies thereof to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Ronald L. Styn, Esquire
Marinos & Styn
111 Elm Street
San Diego, CA 92101

I further certify that all parties required to be served have been served.

Carol MacKinnon
CAROL MACKINNON